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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-508

CALIFORNIA HIGHWAY COMMISSION, DEPARTMENT OF PUBLIC WORKS, *et al.*,

Petitioners,

vs.

RALPH W. KEITH and ESTHER MAY KEITH, husband and wife, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

This brief is submitted by respondents in opposition to the petition for writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the case of *Ralph W. Keith and Esther May Keith, husband and wife, et al. v. California Highway Commission, Department of Public Works, et al.*, No. 72-3072, entered on September 27, 1974.

Opinions Below.

The opinion of the Court of Appeals has not yet been officially reported. It is appended to the petition for writ of certiorari, designated Appendix B. The opinion of the Court of Appeals in this case which was filed on December 3, 1973 and is appended to the petition for writ of certiorari, designated Appendix A, was

withdrawn by the order of the Court of Appeals on April 11, 1974 when it ordered a rehearing in banc in this case. Accordingly, this opinion is of no legal significance and has been inappropriately appended to the petition for writ of certiorari. The opinions and orders of the United States District Court from which petitioners appealed to the Court of Appeals were entered by the District Court on July 7, 1972 and September 11, 1972, and are officially reported in *Keith, et al. v. Volpe, et al.*, 352 F.Supp. 1324 (C.D.Cal. 1972). These opinions and orders are appended to the petition for writ of certiorari, designated Appendix D.

Jurisdiction.

Petitioners invoke the jurisdiction of this Court to review the judgment of the Court of Appeals entered on September 27, 1974 pursuant to 28 U.S.C. §1254(1).

Petitioners also seek to invoke jurisdiction of this Court to review the judgments of the Court of Appeals in the cases of *Roosevelt Lathan and Pearline Lathan, et al. v. Brinegar, et al.*, No. 72-2932 and *Roosevelt Lathan and Pearline Lathan, et al. v. Washington State Highway Commission, et al.*, No. 72-2974, entered on September 27, 1974, pursuant to 28 U.S.C. §1254(1) and Supreme Court Rule 23(5). Only if the defendants in the *Lathan* cases, the United States Department of Transportation and the Washington State Highway Commission, seek review on certiorari could a single petition for writ of certiorari be filed covering both the instant case and the *Lathan* cases. Petitioners herein have no right to petition for writ of certiorari on behalf of the defendants in the *Lathan* cases, and, to respondents' knowledge, such defendants have not petitioned this Court for writs of certiorari.

Question Presented for Review.

Whether the Court of Appeals erred in affirming the District Court's decision to grant a preliminary injunction prohibiting further activities by petitioners with respect to the proposed Century Freeway in Los Angeles until such time as they have certified that they have held or provided the opportunity for additional public hearings in connection with Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a).

Statutes and Regulations Involved in the Case.

The principal statutory provision of concern in this case is Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a), which provides as follows:

> "Any State highway department which submits plans for a Federal aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such

highway. Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered."

The other important provision of the Federal-Aid Highway Act which is involved in the case is Section 106(a), 23 U.S.C. §106(a), which provides as follows:

"Except as provided in section 117 of this title, the State highway department shall submit to the Secretary for his approval as soon as practicable after program approval, such surveys, plans, specifications, and estimates for each proposed project included in an approved program as the Secretary may require. The Secretary shall act upon such surveys, plans, specifications, and estimates as soon as practicable after the same have been submitted, and his approval of any such project shall be deemed a contractual obligation of the Federal Government for the payment of its proportional contribution thereto. In taking such action, the Secretary shall be guided by the provisions of section 109 of this title."

Other statutory provisions of the Federal-Aid Highway Act and their implementing regulations are also involved in the case. These statutes and regulations are appended to the petition for writ of certiorari, and are designated Appendix E.

Also applicable to this case is the National Environmental Policy Act of 1969, 42 U.S.C. §§4321-4347

(hereinafter referred to as "NEPA"). Section 102 of NEPA provides in pertinent part as follows:

> "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> ". . .
>
> "(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." (42 U.S.C. §4332.)

The detailed statement referred to in Section 102(2)(C) of NEPA is commonly called, and is hereinafter referred to as, an "environmental impact statement."

Statement of the Case.

This action concerns a proposed portion of the federal interstate highway system designated I-105, known locally in the Los Angeles area, and hereinafter referred to, as the Century Freeway. The proposed route of the Century Freeway extends from Los Angeles International Airport on the west through the densely populated Los Angeles basin for approximately 17 miles to the east, and traverses the Cities of El Segundo, Hawthorne, Inglewood, Lynwood, South Gate, Paramount, Downey and Norwalk, the Watts area of the City of Los Angeles and unincorporated areas in the County of Los Angeles. Most of the route passes through low and moderate income residential neighborhoods. Thus, if the Century Freeway is constructed, it will be necessary to acquire a total of approximately 3,900 single family homes and 3,000 multiple family dwelling units. This would result in the displacement of approximately 9,000 families, consisting of some 21,000 people. 352 F.Supp. at 1329.

Respondents in this action are eight individuals who live in the proposed route of the Century Freeway, on behalf of themselves and others similarly situated; the National Association for the Advancement of Colored People, representing the interests of its members living in the primarily black communities of Watts and Willowbrook; the Freeway Fighters, an unincorporated association representing the interests of its members opposed to the proposed route's westerly end; the City of Hawthorne, on behalf of its citizens who are overwhelmingly opposed to the proposed route through their City; and the Sierra Club and Environmental Defense Fund, two national environmental organizations concerned about the environmental degradation which would result if the Century Freeway is constructed.

A. District Court Proceedings.

In their complaint, filed February 16, 1972, respondents named as defendants those federal officials primarily responsible for the administration of the federal-aid highway program, and those state agencies and officials primarily responsible for the planning and construction of highways in the State of California. The federal officials named as defendants in the complaint are hereinafter referred to as "federal defendants." The state agencies and officials named as defendants in the complaint are the petitioners herein and are hereinafter referred to as "petitioners."

The complaint contained five causes of action alleging statutory violations, as follows:

1. that by their failure to prepare and consider an environmental impact statement federal defendants had not complied with the requirements of NEPA, and regulations promulgated thereunder;

2. that by their failure to prepare and consider an environmental impact report petitioners had not complied with the requirements of the California Environmental Quality Act of 1970, Calif. Pub. Res. Code §§21000-21174 (hereinafter referred to as "CEQA");

3. that by their failure to prepare adequate housing availability studies and to provide specific assurances with respect to the adequacy of replacement housing federal defendants and petitioners had not complied with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601-4655 (hereinafter referred to as the "Uniform Relocation Act"), and regulations promulgated thereunder;

4. that by their failure to provide adequate relocation assistance federal defendants and petitioners had not complied with the requirements of the Uniform Relocation Act, and regulations promulgated thereunder; and

5. that by their failure to hold adequate public hearings federal defendants and petitioners had not complied with the requirements of Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a), and regulations promulgated thereunder.

On February 16, 1972, respondents also filed a motion for preliminary injunction. Pending the hearing on this motion, respondents applied for a temporary restraining order, and this application was heard by the District Court on March 9, 1972. Following oral argument, the District Court ordered petitioners to refrain from evicting against their will anyone living in the route of the proposed Century Freeway and from instituting any new condemnation proceedings unless good cause was shown the Court.

Respondents' motion for preliminary injunction was heard for four days, from May 2 to May 5, 1972, during which the District Court received evidence and heard oral argument from all parties. At the hearing, it was disclosed that the total cost of the Century Freeway, if constructed, was estimated to be $501,-800,000. 352 F.Supp. at 1329. As the Freeway is part of the interstate system of federal-aid highways, it is anticipated that ninety percent of this cost will be paid for by the federal government. Petitioners testified that a little more than half the property had been acquired for the Freeway, at a cost to the State of California of

$88,651,000. 352 F.Supp. at 1329. As of the date of the hearing, however, petitioners had not commenced construction of the Freeway and had not sought or received federal defendants' approval of the plans, specifications and estimates for the Freeway.[1]

At the hearing, it was also disclosed that the proposed Century Freeway had been the subject of a series of public hearings. With respect to the western portion of the Freeway, route location hearings had been held by petitioners on June 5, 1963 and on August 13, 1965. Three months later, on November 17, 1965, petitioners approved the route location for the western portion. Thereafter, on April 22, 1968, federal defendants approved the route location for the westen portion. Route location hearings for the eastern portion of the Freeway had been held on March 30, 1967 and April 16, 1968. 352 F.Supp. at 1339. Following the latter hearing, petitioners approved the route location for the eastern portion, and it was subsequently approved by federal defendants on October 14, 1968.

For the purpose of planning design, petitioners divided the Century Freeway route into segments and held seven public hearings on June 24, 1969, July 8, 1969, September 17, 1969, October 15, 1969, January 28, 1970, April 22, 1970 and May 13, 1970. Federal defendants approved the design of these segments of the Freeway on August 14, 1968, September 10, 1969, December 23, 1969, February 12, 1970, April 14, 1970,

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[1]Because the preliminary injunction issued by the District Court is still in force, construction of the Century Freeway has never commenced and petitioners have never sought or received approval from federal defendants of the plans, specifications and estimates for the Freeway. Thus, the federal government has never been contractually obligated for the payment of its proportional share of the cost of the Century Freeway.

July 2, 1970, December 1, 1970 and December 15, 1970. The design of the segment that initially received approval on September 10, 1969 was subsequently revised and reapproved by federal defendants on December 23, 1970. 352 F.Supp. at 1332.

Following the hearing, on July 7, 1972, the District Court issued an extensive opinion and granted a preliminary injunction enjoining federal defendants and petitioners from all activities in furtherance of the proposed Century Freeway, except for such activities necessary to comply with the provisions of the injunction, until further order of the Court, or until:

(1) federal defendants complied with NEPA by preparing and considering the environmental impact statement required by Section 102(2)(C) of that Act;

(2) petitioners complied with CEQA by preparing and considering the environmental impact report required by that Act;

(3) petitioners held additional public hearings in connection with the proposed Century Freeway in accordance with Section 128(a) of the Federal-Aid Highway Act, 23 U.S.C. §128(a), and implementing regulations;

(4) petitioners submitted to federal defendants specific project assurances with respect to the adequacy of replacement housing required by the Uniform Relocation Act, and implementing regulations; and

(5) petitioners submitted to federal defendants housing availability studies prepared in accordance with the instructions contained in the District Court's opinion and order of July 7, 1972.

The preliminary injunction also provided that petitioners could acquire property in the route of the Cen-

tury Freeway upon satisfying the Court that the person living or maintaining a business on such property had freely and voluntarily decided to relocate. Finally, the injunction permitted petitioners, upon showing good cause to the Court, to perform demolition or other work in connection with the Century Freeway necessary to protect the public health and safety.

It became clear at the preliminary injunction hearing that at no time during the planning of the Century Freeway had federal defendants prepared and considered the environmental impact statement required by NEPA for "major federal actions significantly affecting the quality of the human environment," although they conceded that the Century Freeway is such an "action." 352 F.Supp. at 1330. Federal defendants contended that NEPA was not applicable because the Century Freeway had been initiated prior to January 1, 1970, the date NEPA became law, and was in an advanced stage of planning as of that date. They also argued that application of NEPA to the Century Freeway would not be practicable, relying on the following language of the guidelines promulgated by the Council on Environmental Quality:

> "To the maximum extent *practicable* the Section 102(2)(C) procedure should be applied to further major federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970." Statements on proposed Federal Actions Affecting the Environment, 36 Fed.Reg. 7723, 7727, ¶11 (Emphasis added) (hereinafter referred to as the "CEQ's Guidelines").

The District Court rejected these arguments, holding that federal defendants had failed to satisfy the strong declarations of Congress expressed in NEPA, and that application of NEPA to a federal-aid highway should not be considered impracticable until, as stated by the Court of Appeals for the Fourth Circuit in the case of *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323, 1332 (4th Cir. 1972), the highway "has reached the state of completion where the costs of abandoning or altering the proposed route would clearly outweigh the benefits therefrom." The District Court held that the Century Freeway had not yet reached that state inasmuch as the planning stage had not been completed at the time NEPA was enacted. 352 F.Supp. at 1332. The Court held that the agency decision-making process was still open with respect to the Century Freeway when NEPA became law, and that the Freeway, as a result, was still at that stage of development in which a careful consideration of the environmental aspects would have been most appropriate. 352 F.Supp. at 1333. Moreover, because the Freeway was still in the planning stage when NEPA became law, the District Court specifically found that the general judicial policy against retroactive application of statutes was inapplicable. 352 F.Supp. at 1333.

Additionally, the District Court expressly disapproved of the Federal Highway Administration's regulations which operated to postpone the effective date of NEPA for 13 months (from January 1, 1970 to February 1, 1971), stating that NEPA did not permit such an emasculation of the Act and the CEQ's Guidelines. 352 F.Supp. at 1333. Finally, the District Court declared that "in planning the Century Freeway . . . defendants made virtually no attempt to evaluate the effect

of the highway on air pollution in the Los Angeles basin," and found this to be an "egregious omission" which "flew in the face" of the CEQ's Guidelines and undermined the defendants' conclusion that the Century Freeway was planned "in such a manner as to give detailed consideration to the potential impact upon the quality of the human environment." 352 F.Supp. at 1334.

Relying on analysis similar to that which it used in finding NEPA applicable, the District Court held that petitioners were required to comply with CEQA by preparing and considering an environmental impact report. The Court rejected petitioners' argument that CEQA was not applicable to the Century Freeway project, and stated that the "uncanny" resemblance between NEPA and CEQA dictated that the same considerations should govern the applicability of both laws to the project. 352 F.Supp. at 1337.

With regard to the issue whether additional public hearings were required, the District Court noted that Section 128(a) of the Federal-Aid Highway Act had been amended in 1968 to require consideraton of social effects, envvironmental impacts and consistency with urban planning. Prior to the 1968 amendments only economic effects were required to be considered. The Court examined the transcripts of all the hearings which had been held by petitioners and the reports which they had submitted to the Federal Highway Administration, and concluded as follows:

> ". . . the transcripts and the reports reveal that very little consideration was given to one of the most important of the Century Freeway's effects —i.e., its effect on noise and air pollution. This

> effect is so crucial and the consideration given to it so minimal that the Court believes that further work on the freeway should be enjoined until the state defendants certify to the FHWA that they have held, or have provided an opportunity for, new public hearings focusing on the likely effect of the freeway on air and noise pollution." 352 F.Supp. at 1339.

Finally, the District Court's opinion of July 7, 1972 addressed the problems of relocation assistance and replacement housing required under the Uniform Relocation Act. Although the Court found that respondents had failed to demonstrate shortcomings in petitioners' program of relocation assistance and payments for those people they had previously displaced from the route of the Century Freeway, it held that petitioners' studies relating to the availability of replacement housing were inadequate. 352 F.Supp. at 1346-49. Further, the Court held that petitioners had failed to give the type of assurances to federal defendants required by the Uniform Relocation Act, *i.e.*, specific assurances that adequate replacement housing was available for those people who would be displaced by the Century Freeway. 352 F. Supp. at 1344.

By motion filed on July 17, 1972, petitioners sought to alter or amend the preliminary injunction. On August 3, 1972, federal defendants joined in this motion. In support of their motion, petitioners urged the same arguments that they subsequently asserted in their appeal to the Court of Appeals; *i.e.*, that additional public hearings should not be required, that laches should be invoked to bar respondents' requested relief and that petitioners should not be enjoined from acquiring prop-

erty for the Century Freeway while the environmental impact statement and report and the housing availability studies were being prepared. This motion was argued by all parties on August 28, 1972.

On September 11, 1972, the District Court issued a second opinion, and specifically refused to alter or amend the terms of the preliminary injunction. 352 F.Supp. at 1354-57. Because of new arguments asserted by federal defendants, however, the Court clarified and reiterated its holding that petitioners were required to hold additional public hearings with respect to the Century Freeway.

B. Court of Appeals Proceedings.

On October 6, 1972, petitioners filed a notice of appeal to the Court of Appeals for the Ninth Circuit. Federal defendants filed a similar notice of appeal on November 9, 1972. The case was docketed in the Court of Appeals on December 7, 1972. Subsequently, on April 30, 1973, federal defendants moved to dismiss their appeal, and the Court of Appeals, on May 17, 1973, issued its order dismissing the appeal of federal defendants. Since the dismissal of their appeal, federal defendants have not been involved in any of the proceedings before the Court of Appeals or this Court. Since that dismissal, petitioners have been the only appellants in the Court of Appeals and are the only petitioners before this Court.

In their opening brief to the Court of Appeals, petitioners made it absolutely clear that they were *not* appealing the District Court's orders requiring compliance with NEPA, CEQA and the Uniform Relocation Act. By their appeal, petitioners only contested that portion of the District Court's orders requiring that they

hold additional public hearings complying with Section 128(a) of the Federal-Aid Highway Act with respect to the proposed Century Freeway. Thus, three of the four causes of action on which respondents prevailed in the District Court were never in issue before the Court of Appeals and are not now in issue before this Court, contrary to petitioners' bald assertion on page 6 of their petition for writ of certiorari that ". . . contrary to the opinions [sic] of the Circuit Court herein, all issues were before the Circuit Court."

In any event, despite this strange (and incorrect) statement by petitioners, the primary legal issue to which all parties have addressed themselves in the protracted proceedings before the Court of Appeals was the appropriateness of the District Court's orders requiring additional public hearings with respect to the Century Freeway.[2] In brief, these appellate proceedings may be summarized as follows:

1. On September 11, 1973, the case was argued before a three-judge panel of the Ninth Circuit sitting in San Francisco.

2. On December 3, 1973, a majority of this three-judge panel reversed those portions of the District Court's orders requiring additional public hearings. Circuit Judge Hamley filed a dissenting opinion in

[2]The only other legal issues which have been considered by the Court of Appeals were whether the District Court abused its discretion in (1) rejecting state defendants' asserted equitable defense of laches with respect to the appropriateness of additional public hearings, and (2) in seeking to maintain the status quo in connection with the proposed Century Freeway by issuing its preliminary injunction.

which he indicated that he agreed with the District Court and would have affirmed its orders. The majority and dissenting opinions are set forth in Appendix A of the petition for writ of certiorari.

3. On December 7, 1973, another three-judge panel of the Ninth Circuit Court of Appeals issued its decision in the cases of *Roosevelt Lathan and Pearline Lathan, et al. v. Volpe, et al.*, No. 72-2932 and *Roosevelt Lathan and Pearline Lathan, et al. v. Washington State Highway Commission, et al.*, No. 72-2974. The *Lathan* cases concerned a federal-aid highway in Seattle, and presented similar facts and the same legal issue which had been decided on December 3, 1973 in the instant case, *i.e.*, whether the Washington State Highway Department was required to hold additional public hearings complying with Section 128(a) of the Federal-Aid Highway Act. In a unanimous opinion, the three-judge panel in the *Lathan* cases decided, contrary to the result reached in the instant case, that such additional public hearings were required.

4. On April 11, 1974, upon the recommendation of a majority of each of the three-judge panels that decided the instant case and the *Lathan* cases on December 3, 1973 and December 7, 1973, respectively, and by vote of a majority of the active judges of the Ninth Circuit Court of Appeals, it was ordered that the assignments of each of the cases to the respective panels which had previously heard them were withdrawn and the opinions and judgments were withdrawn. The Court of Appeals also ordered that the two cases be reheard

together by the Court sitting in banc. This order of the Court of Appeals also provided as follows:

> "While all questions presented in each case will be open for consideration, the principal question to which the court will devote its attention is to whether the court should require that a new hearing be held pursuant to 23 U.S.C. §128(a), as amended, as the panel held in *Lathan v. Volpe*, or should hold that a new hearing need not be held, as a majority of the panel held in *Keith v. California Highway Commission*."

5. On June 12, 1974, the instant case and the *Lathan* cases were argued in San Francisco before the Court of Appeals sitting in banc.

6. On September 27, 1974, the Court of Appeals issued its opinions in the instant case and in the *Lathan* cases. In a decision approved by 12 of the 13 judges sitting in banc, the Court of Appeals affirmed the District Court's order enjoining activities in furtherance of the proposed Century Freeway until, among other things, additional public hearings are held to consider the effect of the Freeway on noise and air pollution. The Court of Appeals also stated that the environmental impact statement required by NEPA which is currently in preparation should be made available before, and considered at, the public hearings.

Thereafter, petitioners filed their petition for writ of certiorari with this Court. The petition was docketed in this Court on October 30, 1974.

REASONS THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

A. The Decision of the Court of Appeals Is Correct.

At the beginning of his opinion in the *Lathan* cases, Circuit Judge Duniway succinctly states the central legal issue and the main reason the Court of Appeals elected to rehear those cases and the instant case in banc, as follows:

> ". . . primarily to consider whether a new public hearing, under 28 U.S.C. §128(a), must be held before further actions are taken to carry out the construction of two portions of interstate freeways." *Lathan* at p. 2.[3]

In *Keith*, this legal issue was raised in connection with petitioners' appeal of that portion of the District Court's order enjoining activities in furtherance of the Century Freeway until such time as they certify to the federal defendants that they have held, or provided the opportunity for, additional public hearings which focus on the effect of the Century Freeway on air and noise pollution in accordance with Section 128(a) of the Federal-Aid Highway Act.

The Court of Appeals disposed of the *Keith* case in summary fashion, stating:

> "Under our decision [in the *Lathan* cases] it was proper for the court to condition lifting the injunction on a new hearing or hearings under sec-

[3]The complete opinions of the Court of Appeals in the instant case and in the *Lathan* cases, both decided September 27, 1974, are set forth in Appendices B and C, respectively, of the petition for writ of certiorari. All subsequent citations to these cases will refer to the name of the case and to the page on which the cited material appears in the appropriate appendix, *e.g.*, "*Keith* at 3" or "*Lathan* at 10."

> tion 128(a). Indeed, under [the decision in the *Lathan* cases], his order could have been considerably more broad than it is. The appellees, however, have not cross-appealed, and thus the only question before us is whether the portion of the preliminary injunction that . . . [requires new public hearings as a condition to terminating the injunction] . . . should be reversed. *Clearly, it should not.*" *Keith* at 4 and 5 (emphasis added).

Because of the Court of Appeals' reliance in the *Keith* case on its decision in the *Lathan* cases, it is necessary to discuss briefly the Court's reasoning in those cases.

The parties in the *Lathan* cases viewed the problem of whether additional public hearings were required under Section 128(a) as one of retroactivity. *Lathan* at 12. Thus, much of the argument centered on whether Congress, in amending Section 128(a) in 1968 to require that social effects, environmental impacts and consistency with urban planning must be considered at public hearings, intended to apply the amended statute retroactively to hearings which had been held prior to 1968. The Court of Appeals took a different approach, however, reasoning that application of the amended statute was *not* retroactive where the highway project is ongoing and where the federal government has not yet committed itself to provide funding for the proposed highway. *Lathan* at 12.

Federal financial commitment occurs *after* a state has certified that public hearings have been held in accordance with Section 128(a) (or an opportunity for such hearings has been afforded), and after it has

submitted, and the federal government has approved, its "plans, specifications and estimates" for a highway project. 23 U.S.C. §106(a). After approval of plans, specifications and estimates, a state is entitled to full reimbursement of the federal government's share of the project's costs if it has conformed to all applicable federal laws. Financial commitment comes at the end of a lengthy process of state actions and federal approvals. Since the Washington State Highway Department in *Lathan* had not applied for or received federal approval of plans, specifications and estimates for the Seattle highway project, the Court of Appeals, sitting as a court of equity, chose to apply the law in effect at the time of judgment (rather than that in effect at the time the action was filed). *Lathan* at 12. The Court stated its position as follows:

> "Moreover, we have no doubt that the Congress can require that there now be a hearing complying with amended Section 128(a) and with the policies of NEPA, *and we are of the opinion that it has done so.*" *Lathan* at 12 (emphasis added).

Construing the current language of Section 128(a) of the Federal-Aid Highway Act, the Court noted that the use of the present tense ("any State highway department which *submits* plans . . . shall certify to the Secretary that it has had public hearings . . .") indicated a Congressional intent to require that public hearings be held which comply with the statute in its present form. *Lathan* at 12 and 13. The adoption of NEPA strengthened the Court's view that the amended version of Section 128(a) was applicable to highway projects for which plans, specifications and estimates have not been approved. *Lathan* at 13. Moreover,

NEPA provides a source of information for the citizens attending hearings in the form of the required environmental impact statement (and which in the instant case is now being prepared by petitioners). The strong language directing that "to the fullest extent possible . . . the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies" of NEPA, 42 U.S.C. §4332(1), was construed by the Court of Appeals in *Lathan* as indicating Congressional intent to apply NEPA's concern for consideration of environmental consequences to ongoing highway projects. *Lathan* at 14. Thus, the Court holds:

> "In short, we hold under the facts here that the policies of NEPA and Section 128(a) must be construed together and that Section 128(a) provides a public forum at which, among other things, the NEPA required [environmental impact statement] will be a basis for the hearing." *Lathan* at 16.

Respondents submit that the *Keith* and *Lathan* decisions are clearly correct. They are supported by the facts, by the language of both the Federal-Aid Highway Act and NEPA, and by the policies underlying those statutes. As shown below, they are in agreement with the decisions of other circuits which have considered the issue. As the settled law of the Court of Appeals for the Ninth Circuit, having been fully briefed, argued, and reviewed by that Court in banc, the decision in *Keith*, read together with the decision in *Lathan*, defines with clarity the legal test that applied to the ongoing Century Freeway.

B. The Keith and Lathan Decisions Are Consistent With Other Cases.

In an effort to create a conflict of decisions with courts of appeals in other circuits, petitioners have cited several cases which they claim are in conflict with the decisions of the Court of Appeals in *Keith* and in *Lathan*. Respondents submit that, to the contrary, the decisions of the courts of appeals in other circuits which have ruled on the issue are consistent with the result reached by the Court of Appeals for the Ninth Circuit.

In the *Lathan* opinion, the Court of Appeals addresses the matter of consistency, and concludes that its decision is supported by cases in other circuits. This conclusion is set forth in a paragraph in which the Court discusses the effect of NEPA on the public hearing requirement of Section 128(a), and is worth quoting in its entirety.

> "Although NEPA itself does not provide for public hearings, its general directives contain one clear message: Environmental protection is a part of every federal agency's mandate; the Act requires 'agencies to *consider* environmental issues just as they consider other matters within their mandates.' *Calvert Cliffs' Coordinating Comm., Inc. v. United States Atomic Energy Comm'n*, D.C. Cir., 1971, 449 F.2d 1109, 1112 (Emphasis in original) Section 128(a) provides the forum for doing so. In cases in which the Secretary has not given PS&E approval to a project, other Circuits have ordered new section 128(a) hearings. *Monroe County Conservation Council v. Volpe*, 2 Cir., 1972, 472 F.2d 693, 701-02; *Arlington Coalition on Transp. v. Volpe*, 4 Cir., 1972, 458 F.2d 1323, 1337-38." *Lathan* at 16 (emphasis in original).

In a footnote, the *Lathan* opinion goes into greater detail about the consistency of the *Lathan* and *Keith* decisions with other circuits, stating as follows:

> "While the court in *Arlington Coalition* states at one point that 'P. S. & E. approval has not yet been given,' 458 F.2d at 1332, the court at another point states that 'by July 28, 1966, acquisition-of-right-of-way agreements between the state highway department and the Secretary had been entered into for the entire project,' and the state had been reimbursed $28,679,123.07. *Id,* at 1328. The court therefore may have meant to say at p. 1332 that no PS&E approval *for construction* had yet been given.
>
> "In *Monroe County,* the state highway department had not yet submitted its plans, specifications and estimates, but it was undisputed that the federal government was prepared to give PS&E approval after submission; *see* 472 F.2d at 696.
>
> "Where the highway in question has actually been under construction, it has been held that the amendments do not apply. *Wildlife Preserves, Inc. v. Volpe,* 3 Cir., 1971, 443 F.2d 1273. That is not this case. *See also Ragland v. Mueller,* 5 Cir., 1972, 460 F.2d 1196, and *Pennsylvania Environmental Council, Inc. v. Bartlett,* 3 Cir., 1971, 454 F.2d 613, in which the courts held that NEPA did not apply to Federal-Aid Highway projects in cases in which PS&E approval had been given by the Secretary prior to January 1, 1970, and construction on the highways in question had begun as of the time the lawsuit was commenced. In *Ragland,* for example, sixteen of the twenty

> miles of the disputed highway had been fully completed as of January 1, 1970, the effective date of NEPA. *See also Citizens Environmental Council v. Volpe,* 10 Cir., 1973, 484 F.2d 870." *Lathan* at 16 and 17, footnote 28.

In *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323 (4th Cir. 1972), the facts were similar to the instant case, except that the proposed highway project in that case was much closer to completion than the Century Freeway. In ruling that defendants must hold new public hearings, the Court said:

> "We think that the requirements added to Section 128(a) apply to a highway ongoing at the effective date of the amendment if the costs of altering or abandoning the proposed location would not certainly outweigh whatever benefits might be derived therefrom. Our conclusion is compelled by the congressional directive in Section 102 of [NEPA]." 458 F.2d at 1337.

Although the *Arlington* case used a different test, it is certainly not in conflict with the *Keith* and *Lathan* decisions, as evidenced by the Court of Appeals' discussion quoted above.

In *Monroe County Conservation Council v. Volpe,* 472 F.2d 693 (2nd Cir. 1972), the initial hearing on the highway project in question had been held in 1966. In holding that new hearings complying with the amended version of Section 128(a) must be held, the Court said that new hearings are required whenever federal approval of plans, specifications and estimates has not been given prior to the effective date of the 1968 amendment to Section 128(a). The court stated:

> "This rule is based upon the fact that a hearing is a condition precedent to the granting of federal aid, and, therefore, the Secretary must apply the statute which is in effect when he awards that aid. This concept is consistent with the federal policy which favors the advancement of environmental concerns, 42 U.S.C. §4332(1) [Section 102 of NEPA], and gives recognition to the importance of the hearings to proper decision making [citing *D.C. Federation of Civic Associations v. Volpe,* 434 F.2d 436, 441-42 (D.C. Cir. 1970)]." 472 F.2d at 701.

This is the conclusion reached by the Court of Appeals in the *Keith* and *Lathan* cases. Thus, hearings complying with Section 128(a) are required under the *Monroe County* test as well as under the more broadly stated, though not inconsistent, test applied in *Arlington.*

Petitioners also attempt to find a conflict within the Ninth Circuit, citing *Jicarilla Apache Tribe v. Morton,* 471 F.2d 1275 (9th Cir. 1973), as a decision in conflict with the *Keith* and *Lathan* cases. Of course, if there were a conflict, the *Jicarilla* decision would simply be superseded by the later, in banc ruling of the same court in *Keith* and *Lathan.* However, there is no such conflict. In holding that the policies of NEPA and Section 128(a) of the Federal-Aid Highway Act must be construed together and that Section 128(a) provides a public forum at which the environmental impact statement required by NEPA will be

part of the basis for the hearing, the Court of Appeals in *Lathan* specifically relied on *Jicarilla* as follows:

> "In so holding, we have the support of our own prior decisions, and of those of other circuits. We have held that agencies are not relieved of the obligation to evaluate the environmental consequences of their actions merely because a particular project was initiated before the effective date of NEPA *See Jicarilla Apache Tribe of Indians v. Morton,* 9 Cir., 1973, 471 F.2d 1275, 1282-83; *Lathan v. Volpe, supra,* 455 F.2d at 1120-21. With respect to ongoing projects, section 128 (a) and the regulations which implement it must be interpreted and administered, 'to the fullest extent possible,' in accordance with the policies of NEPA. In appropriate cases this may mean total reassessment of the project in light of its potential environmental impact, i.e., the consideration of its wholesale alteration or abandonment. *Cf. Jicarilla Apache Tribe of Indians v. Morton, supra.*" *Lathan* at 16.

The Court of Appeals' reliance on *Jicarilla,* as quoted above, is correct. Moreover, under no circumstances could the *Jicarilla* decision be considered to be in conflict with the central issues involved in *Keith* and *Lathan.* In *Jicarilla,* the Court of Appeals held that NEPA did not require public hearings to be held in connection with the construction of certain power plants. That is correct, since NEPA, *by itself,* does not require public hearings. However, *Jicarilla* does not stand for the proposition that public hearings are not required in

any case, since there was no statute involved in *Jicarilla* comparable to Section 128(a) of the Federal-Aid Highway Act which would have required public hearings with respect to power plant construction. Accordingly, respondents submit that petitioners' attempt to show a conflict of opinions within the Ninth Circuit completely misses the mark.

Finally, in their attempt to find a conflict of decision, petitioners rely on the case of *United States v. SCRAP*, 412 U.S. 669 (1973). In *SCRAP*, most of the nation's railroads filed with the Interstate Commerce Commission a proposed interim surcharge on freight rates, pending adoption of proposed permanent rate increases. Section 15(7) of the Interstate Commerce Act, 49 U.S.C. §15(7), vests exclusive power in the Commission to suspend rates pending its final decision on their lawfulness, and expressly withdraws from the judiciary any pre-existing power to grant such relief. The Commission refused to exercise its power under Section 15(7) to suspend the interim surcharge, but ordered the proposed permanent rate increases suspended for the statutory seven-month period.

Thereafter, environmental protection groups filed an action seeking a preliminary injunction to restrain enforcement of the Commission's orders until an environmental impact statement was prepared and considered pursuant to NEPA. The Supreme Court, in an opinion by Justice Stewart, held that NEPA did not amend or repeal by implication Section 15(7). The Court held that under this statute the Commission has exclusive authority to suspend rate increases, and that the federal courts lack jurisdiction, even in the absence of compliance with the environmental impact statement requirements of NEPA.

No such problem exists in the *Lathan* and *Keith* cases. The Court of Appeals did not hold that NEPA had amended or repealed any statute, implicitly or otherwise. As quoted above, the Court of Appeals only held that the policies of NEPA and Section 128(a) must be construed together in a consistent manner. The *SCRAP* decision is simply irrelevant to the *Lathan* and *Keith* cases and certainly presents no conflict.

Conclusion.

For the foregoing reasons, respondents respectfully submit that the petition for writ of certiorari should be denied.

Dated: November 26, 1974.

Respectfully submitted,

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